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IN THE
Supreme Court of the United States

KIRK TEDFORD,

Petitioner,

v.

BENCHMARK INSURANCE COMPANY AND
THE FUTURE EQUIPMENT COMPANY, INC. EMPLOYEE
WELFARE BENEFIT PLAN

Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY BRIEF
AND SUPPLEMENTAL APPENDIX

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REPLY

Petitioner acknowledges the Certificate of Insurance excludes coverage where the losses to the insured are caused by the insured's intoxication or use of illegal narcotics. Mr. Tedford contends the accident he was in was not a result of intoxication or drug use. CBSA, Benchmark's claims processor, concluded it was. The issue is whether the claims adjustor's denial of benefits is final and not subject to review in a federal court unless the insured can prove the decision-maker acted arbitrarily and capriciously. The Fifth Circuit says it is, regardless of whether the Plan expressly grants to the decision-maker such a role. Seven other circuits disagree.

Here, Benchmark did not interpret the policy, and it made no factual determinations under the policy as to whether benefits were payable. CBSA, Benchmark's claims adjustor, denied Tedford benefits, even before he filed a claim, and denied his appeal two months after the employer terminated the Benchmark policy, and obtained another policy for the employee benefit plan. Neither Benchmark nor CBSA were ever the Plan Administrator – both three times expressly disclaiming that capacity or role. Nonetheless, Respondents twice assert that CBSA was "administrator of the Plan." (Brief in Opposition at 3) No effort is made to explain why CBSA so often disclaimed any role as plan administrator. The Respondents' record cites show that CBSA was Benchmark's administrator of the insurance policy for very limited purposes, but was not the ERISA Plan Administrator. (Record 163-187)

Respondents assert CBSA had "unfettered discretion to deny claims." (Brief in Opposition at 9) Respondents contend that in spite of its repeated disclaimers that it was

not a fiduciary for ERISA purposes, CBSA "exercised" its discretion to deny Tedford's claim, and therefore was a fiduciary. Having declared CBSA a fiduciary, Respondents, relying on "sacrosanct" trust principles, conclude that CBSA was a "trustee" and its denial of benefits "is not subject to the court's control except to prevent an abuse of discretion." (Brief in Opposition at 12) Regrettably, the Fifth Circuit agrees. But neither Respondent nor the Fifth Circuit explain how "unfettered discretion to deny a claim" can involve discretion at all. "CBSA only had discretion to deny Tedford's claim" is equivalent to "CBSA had no discretion."

CBSA was not a trustee for Tedford as a beneficiary. There is no trust-beneficiary relationship involved here. There is an insurance company issuing a group policy with its claims adjustor denying benefits. In any other identical situation – other than an employer arranged for insurance policy in the Fifth Circuit – the factual disputes between the insured and insurer would be decided in a court based on the evidence and law, as with any other contract claim. That never can happen in the Fifth Circuit district courts as to ERISA covered group insurance policies, because all factual disputes are resolved in favor of the insurer on the unfounded assumption that insurers' claims adjustors are fiduciary trustees. This presumption prevails even if: (1) no language in an ERISA plan accords the adjustor such an exalted status and (2) over the insurer's and adjustor's express disclaimers that they are not fiduciaries or administrators for purposes of ERISA. That is why this Court should grant the petition and resolve the conflict between the circuits against the Fifth Circuit rule.

Respondents argue this case is not about *Pierre v. Connecticut General Life Insurance Co.*, 932 F.2d 1552 (5 th Cir.) *cert. denied*, 502 U.S. 973 (1991), but should be

"decided by reference to *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) and not *Pierre*." (Brief in Opposition at 7). The trial court did not rely on *Bruch*, but relied on *Pierre*, because "the Fifth Circuit holds that factual determinations are to be reviewed under an abuse of discretion standard" while "*Bruch* [is] limited to matters of plan interpretation when the facts are not in dispute . . . ." (App. 14a-15a). The trial court was partially correct; there is no basis in *Bruch* for according factual determination of administrators or claims adjustors any deference.

The Fifth Circuit misread *Bruch* in holding that "[i]n ERISA cases, that standard [abuse of discretion] requires that all . . . determinations of eligibility for benefits by the plan administrator be affirmed unless found to be arbitrary and capricious" citing *Firestone Tire & Rubber Co. v. Bruch* as authority. (App. 3a-4a) *Bruch* affords no authority for the Fifth Circuit rule of deference to all determinations of eligibility. The relevant parts of this Court's decision in *Bruch* are:

- *De novo* review was held to be the proper standard in *Bruch*: "we hold that a denial of benefits challenged under §1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits,"489 U.S. at 115;
- "The trust law *de novo* standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA. Actions challenging an employer's denial of benefits before the enactment of ERISA were governed by principles of contract law," *id.* at 112;

- This Court rejected Firestone's argument that a "plan administrator, fiduciary, or trustee is empowered to exercise *all* his authority in a discretionary manner subject only to review for arbitrariness and capriciousness," *id.* at 113; because
- "Adopting Firestone's reading of ERISA would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted," *id.* at 113-114.

Employees under ERISA plans in the Fifth Circuit have less protection than they enjoyed before ERISA. Indeed, ERISA, as interpreted by the Fifth Circuit, dictates employees always lose factual disputes. *Pierre* is in direct conflict with *Firestone Tire & Rubber Co. v. Bruch.*

Finally, Respondents repeatedly chastize Petitioner for not proving he was not intoxicated, going so far as to assert that Mr. Tedford "did not remember the events leading up to the crash" (Brief in Opposition at 2) and that he, "almost three (3) years after the accident, has not and could not present any new evidence" (Brief in Opposition at 7). Respondents know this is incorrect, and invite a rejoinder based on evidence that should be admissible, but is not under the Fifth Circuit rule in *Pierre*. Mr. Tedford was deposed on April 30, 2001, by Benchmark's counsel. The Supplemental Appendix, pages 28a - 32a attached, indicate that Mr. Tedford remembers the events leading up to the accident. He remembers a police officer stopping him before the accident, they conversed, and that officer sent him on his way, not believing Mr. Tedford was intoxicated. Nor did the investigating officer of the accident suspect alcohol or drugs contributed to the accident. Mr. Tedford's wife was with him all day. Mr.

Tedford described the scene of the accident, and how this poorly designed off-ramp had caused many accidents. Photos were available to prove his point.

This Court is not being asked to decide whether intoxication caused the accident. The issue is who should decide whether the accident was a consequence of intoxication or drug use, the claims adjustor or district court. Mr. Tedford never had the chance to present to an impartial trier of fact his testimony, call the police officers or firemen, or present his wife's testimony. There was no trial. CBSA denied benefits in March 2000, without ever contacting Tedford. It denied his appeal in July 2000, without ever talking to Mr. Tedford, though he twice wrote and asked if he could provide any additional information. CBSA concluded Mr. Tedford used illegal drugs. This was false. Respondents' own expert proved it false long after Tedford's benefits and appeal were denied, relying on evidence not included in CBSA's Administrative record. Respondents also continually assert that Tedford had a blood alcohol level of .12. (Brief in Opposition at 2,6,14) Respondents' number arises only in a post-denial expert's report, appears nowhere in the administrative record, and given an opportunity at trial, Petitioner will prove the retrograde analysis incorrect. Had Tedford had a trial, maybe the trier of fact would have concluded he was not intoxicated.

Mr. Tedford worked for and paid for insurance. Part of the payment for that insurance was deducted from his check. He and the insurer disagree about whether he was intoxicated, and what caused the wreck. The difference between them is that the insurer's decision is presumed correct in the Fifth Circuit, and whatever evidence Mr. Tedford may have to the contrary is inadmissable in

federal court. And if that is not an abuse of discretion, it is unquestionably a travesty of justice.[1]

CONCLUSION

The judgment below should be reversed. The case should be remanded to the trial court for further proceedings conducted in accordance with this Court's decision.

Respectfully submitted,

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November 1, 2002

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[1]SHEPARD'S on LEXIS reflects 95 Fifth Circuit District Court decisions citing *Pierre*, 932 F.2d 1552. A review of those District Court decisions indicates that 59 cited *Pierre* in considering ERISA administrators' factual decisions. All 59 decisions applied the abuse of discretion standard of review to the administrators' factual conclusions. In 59 decisions, the defendants' motions for summary judgment were granted 47 times, or 80% of the time. Plaintiffs' motions for summary judgment were granted 4 times or 7% of the time. Two cases involved summary judgment on part of the claim for both parties. Motions for summary judgment were denied 6 times, for various non-dispositive reasons. In thirteen years, only 5 trials are reported, and Defendants won 4 times. In Fifth Circuit District Courts, plaintiffs do not get trials on factual disputes in ERISA cases. Plaintiffs in 86% of the ERISA in cases in Fifth Circuit District Courts loose when the disputes are factual.

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SUPPLEMENTAL APPENDIX

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Tedford Deposition Excerpts
April 30, 2001

P. 35 line 5:

Q. All right. Tell me now about the design of that intersection.

A. It is fairly unusual, I'd say, in the metroplex to have an exit ramp that turns you out on a two-way service road. I was not familiar with this ramp. After living in this area most of my adult life, I really couldn't ever recall and still don't recall ever taking – had no reason to go to Haltom Road.

And it goes up a slight incline off the freeway and makes a fairly hard curve to the right and dumps you out perpendicular on the access road. And there is a curb, and – the normal highway curb, and directional signs that tell you to make a hard right.

It's a poor design. It's not lit. It dumps you onto a two-way service road. Going back and looking now at the scene, there's car parts all in the ditch from people hitting the curb. The signs are all bent.

The firemen have told me that they have gone and put PVC pipe in the ground so that in the ground so that, when the signs do fly out, they can go over and just set them back in their place. There's a fire station right there on the corner of Haltom Road and 820. You know, normally –

Mr. Broiles: We have some photographs if you want to see photographs.

Mrs. Malone: That's all right. I would just like him to describe it for me. Thank you. I appreciate it.

A. Driving a motorcycle for 31 years, 20 plus on the street, if I ever came near to having an accident, it was another – car involved not watching for motorcycles. You would always watch their hands on the steering wheel, watch their front tires drive defensively on a motorcycle, assuming that they're not going to see you.

So, yes, I would like to think that there was maybe a car coming what I thought was the wrong way down a one-way service road. I didn't know that was a two-way service road – and we were going to have a head-on on the ramp. That's one idea I've had that –

And my wife said that there was a car parked on the service road on the eastbound – headed eastbound. So, when she drove up on the scene, there were already people there. So was this car what I thought was, you know, going to be getting on the freeway going the wrong way and we were going to have a head-on on the ramp? I don't know.

Or did I follow the car in front of me over the curb because the car tracks, skid marks – the signs are bent and twisted and laying down. I mean, it's all there. Did I just follow him over the curb? I don't know. **P. 37, line 12**

* * * *

P. 45, line 4

Q. Okay. All right. You indicated in some of the documents that have been filed in this case on your behalf with your signature that — or suggested that perhaps the lab tests indicating that your level of intoxication were wrong. Can you tell me what the basis for that is, sir?

A. Well, it says on the report that it was not taken for forensic purposes. I don't feel like the level that it showed is possible because I had not consumed that amount of alcohol. And over the period of time given, from 2:00 to 11:00, I don't see how it could be possible.

Q. Okay. So basically, you just – you feel that you just did not drink that much alcohol, and you don't think the test results are accurate?

A. Yes. **P. 45, line 19**

* * * *

P. 47 line 4

Q. I'm sorry. Will you agree with me that they cite a provision saying they will not be paying for losses sustained or contracted in the accident because of intoxication or influence of alcohol at the time? Is that correct?

A. I suppose. However, you know, if you look at the police report, there's – they had the opportunity to put down there that alcohol or intoxication or – was involved in the accident. And that was not so marked. **P. 47, line 13**

* * * *

P. 48, line 17

Q. All right. And you indicated that the police officers did not take any action against you –

A. No.

Q. – as far as DWI or anything like that?

A. No.

Q. Is that true?

A. That's – yes. **P. 48, line 24**

* * * *

P. 52, line 14

Q. Okay. And, in Paragraph Number 3 of that same document, you specifically deny that you were under influence at the time of the injury; is that true?

A. Under Number 3?

Q. Yes, sir.

Mr. Broiles: Did you say influence of narcotics or just influence?

Ms. Malone: This one says, was not under the influence of narcotics while –

Q. Is that true?

A. That's true.

Q. Okay. And, again, that is in direct rebuttal of Exhibit Number 1 under the denial where it indicates that they may not pay if it's under the influence of any narcotic. Is that true?

A. Yes, that's true.

Q. Okay. And in Paragraph Number 4 of Page 1, Exhibit 3, you indicate – the appeal indicates that you were not intoxicated

and any alcoholic beverages consumed did not cause those injuries. Is that true?

A. That's true.

Q. And, again, that's in direct rebuttal of what Exhibit Number 1-U says; is that true?

A. That's true. **P. 52, line19**

* * * *

P. 77, line 23

Q. When you left Wilhoite's, did you feel like that the alcohol you had consumed that day had impaired your abilities to drive the motorcycles?

A. No, it did not.

Q. Did Zana [wife] say anything to you about your ability being impaired?

A. When I dropped her off at her car, she just told me as usual, "Be careful." And that was it.

Q. Between the time you left Wilhoite's and the time you got back to the sports complex, did you see anyone along the route?

A. No one I knew.

Q. Okay. Did you see anyone –

A. I'm sorry. I'm sorry. Yes, I did – not anyone I knew. But from Wilhoite's back to the stadium, I was pulled over for speeding.

Q. By whom?

A. It was either a North Richland Hills or City of Hurst police officer. I had to bypass the original exit because of traffic to get to where we needed to be. I bypassed it, went down to the next exit ramp, got off. It made me take the longer way back to the stadium. And I got pulled over for speeding, left a red light and had a loud Harley. It was Friday night. And he pulled me over. We talked for 5 or 10 minutes. And there was no citation issued.

Q. Did you get off of the motorcycle or sit on the motorcycle?

A. No. I got off and spoke to him.

Q. Was the officer in an automobile or on a motorcycle?

A. He was in an automobile.

Q. And did he see you walk?
A. Yes, he did.
Q. Did he – was he able to observe your conduct?
A. Yes, he was.
Q. Did he say anything or ask you anything about whether or not you had consumed alcohol?
A. No, he did not.
Q. Did he make any comment in any way relating to intoxicants?
A. No. No, he did not. **P. 79, line 19**